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# Before the FEDERAL COMMUNICATIONS COMMISSION, Ed., Washington, D.C. 20554

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In the Matter of	)	
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Carriage of the Transmission	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
Amendments to Part 76	)	
of the Commission's Rules	)	

### COMMENTS OF BET HOLDINGS II, INC.

Henry M. Rivera
Thomas A. Hart, Jr.
Amy E. Weissman
Kathrine L. Calderazzi
SHOOK, HARDY & BACON L.L.P.
1850 K Street N.W., Suite 900
Washington, D.C. 20006
(202) 783-8400
Its Counsel

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#### **SUMMARY**

The television industry is poised to undergo a transition to digital television ("DTV") that is expected to have a profound impact on consumers and industry. This anticipated impact, however, is based on mere speculation, for no one knows exactly how, when, or if it will materialize.

In truth, the transition to DTV is uncertain in every material respect, e.g., consumer demand, technology, price, and timing. Despite that uncertainty, the Commission proposes to ignore the unknowns and unknowables in order to impose digital must-carry rules. The proposed digital must-carry rules are intended to guarantee carriage of digital broadcast programming throughout the transition to DTV, despite the fact that the Commission has not identified any definite carriage problem requiring such a solution. The Commission should reject the proposed rules because they are bad policy, impermissible as a matter of law, constitutionally defective, and conceptually flawed.

Statutory Prohibition: Neither the Communications Act of 1934, as amended, nor the Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act") authorizes the Commission to implement a digital must-carry regime, particularly while the analog must-carry rules are in effect. Section 614(b)(4)(B) of the Communications Act directs the Commission to impose digital signal carriage requirements only after analog signals have been replaced with digital signals. It does not authorize or require the Commission to impose digital must-carry rules in addition to the existing analog rules, thereby giving broadcasters another federal subsidy in addition to the free spectrum given to broadcasters last year. Moreover, the proposed rules run afoul of another portion of Section 614 of the Communications Act, which expressly prohibits the type of duplication of signals that the digital must-carry rules would cause.

Constitutional Violation: The proposed digital must-carry rules violate the First Amendment to the Constitution. Because the proposed rules burden the speech of cable operators and cable programmers, the Commission bears the burden of demonstrating that the proposed rules satisfy the First Amendment. The Commission cannot carry its burden.

Congress based the analog must-carry rules, which were upheld in the *Turner II* decision, on vastly different facts than are at issue in this proceeding. In enacting the analog rules, Congress was concerned that free over-the-air broadcasting be preserved; that the public not suffer from a lack of diverse sources of programming; and that broadcasters be on an equal competitive footing with cable operators. In the case of DTV must-carry rules, in contrast, the proposed rules will not preserve free over-the-air broadcasting, which is already adequately protected by the analog must-carry rules and retransmission consent provisions. Furthermore, the proposed rules will reduce, if not eliminate, the widespread dissemination of information from a multiplicity of sources by forcing cable programmers off cable systems and leaving viewing audiences with vastly diminished viewing choices. The overall effect on the diversity of cable programming sources will be overwhelmingly negative. Finally, the proposals will undermine the policies and statutes fostering competition, keeping cable programmers on unequal footing in comparison to broadcasters and making it even harder for cable programmers to compete for limited channel capacity. Consumers will suffer most of all, in direct contravention of the Commission's charge to regulate in the public interest.

In the face of these many uncertainties and infirmities, the Commission should decline to adopt digital must-carry rules. Instead, the Commission should allow the various players involved in the transition to define the terms of the transition. Consumers should define the demand for DTV and the acceptable price point for DTV equipment; cable operators and broadcasters should define

the extent and terms of carriage through the existing retransmission consent provisions, which have been far and away the method of choice for analog broadcast television; and other members of the industry should weigh in on the speed, timing, technology, pricing, and other aspects of this transition.

In conclusion, it bears underscoring that the adoption of DTV must-carry rules will exact a price -- and consumers and cable programmers will pay that price. The Commission is not writing on a blank slate, and the consequences of adopting DTV must-carry rules will be extreme. While it is not the Commission's role to guarantee the perpetual economic viability of the businesses affected by its regulations, the Commission cannot and should not alter the regulatory status quo without an ironclad foundation in law and policy. The Commission has no such solid foundation in this instance.

# Before the FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

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To: The Commission

#### COMMENTS OF BET HOLDINGS II, INC.

#### I. BACKGROUND

BET Holdings II, Inc. ("BET") is a cable television entertainment business that reaches over 54 million cable households¹ through its cable programming services -- BET Cable Network, BET on Jazz, Action-Pay-Per-View, and BET Movies/Starz!3 (the only premium movie channel created exclusively to meet the unique entertainment needs of African-American viewers). BET is a leading media company that targets African-American consumers. Its programs include Lead Story, BET Tonight, Heart & Soul, Buy the Book, Teen Summit, and other contemporary programming covering news, information, politics, talk shows, health and fitness, literature, business, music videos, sports, family sitcoms, specials, and gospel. The name and logo BET are recognized by more than 90 percent of African Americans.

<sup>1.</sup> According to Nielsen Media Research.

BET is a closely held company whose controlling shareholders are Robert Johnson and Liberty Media. In addition to its cable programming services, BET has undertaken joint ventures to publish books and produce feature length films, and has partnered with Microsoft to develop online programming and interactive software programs for African-American consumers. Furthermore, BET has developed and owns interactive theme restaurants known as "BET Soundstage" in Largo, Maryland, "BET On Jazz" in Washington, D.C., and "BET Soundstage Club" at Disney's Pleasure Island Resort in Orlando, Florida. BET also delivers programs internationally via BET International to Japan, Canada, Poland, Spain, Italy, South Africa, the Caribbean, and the United Kingdom.

BET has a vital interest in the future of cable television and the development of digital television. BET has actively participated in MM Docket No. 87-268, Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, in which the Commission addressed digital broadcast television carriage issues. In that proceeding, the Commission gave broadcasters publicly-owned spectrum worth billions of dollars -- for free.

Now the Commission is considering imposing digital must-carry rules, which range from requiring cable operators to immediately carry all digital signals to imposing no digital must-carry obligation whatsoever on cable operators. BET strongly opposes mandatory carriage of digital transmissions. If the Commission imposes digital must-carry rules concurrent with the existing requirements for analog broadcasts, the same broadcasters, who last year received billions of dollars worth of digital TV spectrum for nothing, will receive a further federally subsidized windfall, at the expense of consumers and cable programmers such as BET. The Commission cannot satisfy its burden of justifying the proposed digital must-carry rules; rather, as BET will show in these

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Comments, allowing broadcasters to dictate the allocation of cable channels to the exclusion of other cable programming entities contravenes many FCC policies, the Telecommunications Act of 1996, the Cable Act of 1992, and the Constitution. As exemplified by recent news articles regarding media consolidation, broadcasters have already benefited from federal subsidies in digital television and a significantly deregulated ownership environment.<sup>2</sup> Further subsidies in the form of a federally mandated digital must-carry regime cannot be justified.

Technology has once again surpassed the underlying purposes of regulation. The Commission's proposals are premised on existing analog must-carry rules that were implemented before many technological advances made broadcast reception easier and more convenient, as explained in Paragraph 16 of the NPRM. The proposed digital must-carry rules will be imposed in vastly different circumstances than their analog predecessors, and will have precisely the opposite effect from what the Commission hopes to achieve by such rules. In particular, digital must-carry rules will threaten diversity and competition because, at this time, the majority of cable systems in the top 10 markets are channel-locked and have no available channels to accommodate additional mandatory carriage. For channel-locked systems, where will these new broadcast channels be placed? The answer can only be that one existing channel will be dropped for every digital channel added, and cable programmers will encounter limited ability to competitively expand and diversify programming offerings to consumers.

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<sup>2.</sup> See, e.g., "Is Television's Future In This Man's Hands?," New York Times, October 4, 1998, Section 3, p.1 (discussing consolidation in the television industry, and focusing on David D. Smith's, CEO of Sinclair Broadcasting Group, vision of the television industry, Sinclair's current control of 64 television stations, and the recent push by many big station group owners for relaxation of the current ownership limitations, which would make these big companies larger and more profitable).

Digital must-carry rules rule will likely impact African-American and other minority viewers disproportionately. According to a recent study of cable television programs, whites, African-Americans, and Hispanic-Americans have roughly the same household penetration of cable television. Yet African-Americans subscribe to premium cable services and pay-per-view programs at nearly twice the rate of white households, and watch almost twice as many hours of television each week.<sup>3</sup> Thus, African-Americans will be most affected by the loss of cable programming targeted to that niche market if cable operators are forced to drop BET in response to mandatory digital carriage rules.<sup>4</sup>

Further, such an adverse impact will also be experienced beyond the African-American community. All Americans will suffer from the loss of diverse programming and the economic concentration that digital must-carry rules will cause. Ownership of commercial television broadcast stations is becoming increasingly concentrated in a few large regional, national, or global conglomerates, which also own or control cable programming companies.<sup>5</sup> Although the

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<sup>3.</sup> Jorge Reina Schement, *Thorough Americans: Minorities and the New Media*, <u>Investing in Diversity</u> (Aspen Institute 1998), at 107-08.

<sup>4.</sup> Not only the quantity of programming will suffer, but the quality as well. For example, BET produced a talk show in response to the debut of UPN's "The Secret Diary of Desmond Pfeiffer," a new sitcom that touches on slavery and the Civil War. See "UPN's Desmond Pfeiffer: A Bad Idea Gone Wrong," The Washington Post, October 6, 1998, p. D1. The show has disturbed many members of the African-American community, which looks to BET for leadership in discussing such issues.

<sup>5.</sup> See, e.g., supra n.2 (discussing Sinclair CEO's belief that in the future, the television industry will be ruled by ten to fifteen "enormous station groups" like Sinclair that will control the distribution of programming); "Gore Stumps for Minority Ownership," Broadcasting & Cable, September 21, 1998, p. 7 (noting consolidation in broadcasting industry and decrease in minority ownership).

Commission's policies have created a more diverse programming environment in general, concentration of ownership characterizes the broadcast programming market and its editorial content.

Thus, the proposed digital must-carry rules will further eradicate media competition and increase market concentration. Furthermore, such rules will create a cable system channel capacity crisis that will destroy what diversity in cable programming voices currently exists, and prevent broadcasters and cable operators from reaching mutually acceptable market-based agreements as to how best to transition to DTV. The Commission should therefore reject must-carry rules for digital television, and instead allow broadcasters and cable operators to reach market-based agreements as to when and where digital programming is carried.

#### II. ARGUMENT

As demonstrated below, the proposed digital must-carry rules exceed the Commission's statutory authority and contravene the anti-duplication provisions of the Communications Act of 1934, as amended. Furthermore, the proposed rules are constitutionally defective.

In addressing these statutory and constitutional challenges, the Commission must be guided by the public interest standard, and must recognize that the interests of viewers are paramount when First Amendment freedoms are at stake.<sup>6</sup> The Commission appears to recognize the importance of the public interest in this rule making, see, e.g., NPRM ¶1, but limits its public interest inquiry to

<sup>6.</sup> Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1453 (D.C. Cir. 1985), cert. denied, 476 U.S. 1169, 90 L.Ed.2d 977, 106 S. Ct. 2889 (1986) (citing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390, 89 S. Ct. 1794, 1806, 23 L.Ed.2d 371 (1969)).

identifying how best to bring digital television to consumers, despite the fact that consumers are not apparently clamoring for such services.<sup>7</sup>

In order to avoid the constitutional and statutory infirmities that plague the proposed rules, the Commission should allow the existing analog must-carry rules, retransmission consent provisions, and the marketplace, in the form of consumer demand, to define the transition to digital television. Only in that way will the public interest be served, the interests of all involved parties be adequately protected, and the constitutional and statutory mandates governing this proceeding be followed.

#### A. The Governing Statutes Do Not Authorize Digital Must-Carry Rules

In the NPRM, the Commission proposes seven different approaches to the carriage of digital transmissions. The first six proposals will impose upon cable operators some form of DTV must-carry obligation. (NPRM, ¶¶ 41-49). In any guise, however, the proposed digital must-carry rules exceed the scope of the Commission's statutory authority and violate the statutory prohibition against carriage of duplicate signals.

1. Imposing Digital Must-Carry Rules While Analog Must-Carry Rules Are In Place Violates the Express Language of Section 614(b)(4)(B) of the Communications Act of 1934, 47 U.S.C.A. § 534(b)(4)(B) (1997)

<sup>7.</sup> In fact, Mitchell Stern, chairman of Fox Television, acknowledged that the market for the digital television launch in November 1998 is "essentially none." *See* "Is Television's Future In This Man's Hands?", *New York Times*, October 4, 1998, Section 3, p.1

The Commission asserts that the Communications Act compels it to initiate this rule making proceeding and to define the scope of carriage requirements during the transition to digital.<sup>8</sup> The Commission is correct, but only to a point.

The statutory provision in question states:

Signal Quality...(B) Advanced television. At such time as the Commission prescribes modifications of the standards for television broadcast signals, the Commission shall initiate a proceeding to establish any changes in the signal carriage requirements of cable television systems necessary to ensure cable carriage of such broadcast signals of local commercial television stations which have been changed to conform with such modified standards.

47 U.S.C. § 534(b)(4)(B) (emphasis added). A fair reading of this statute is that only the original analog signal qualifies for carriage so long as it is being broadcast, and that digital must-carry obligations commence, if at all, only after the analog broadcast signals have been replaced with digital signals -- that is, when the signals "have been changed." In addition, as reflected by the heading "Signal Quality," the statute can reasonably be read to mean that Congress was only interested in having the FCC initiate a proceeding to protect the integrity of signal quality, i.e., to promote unadulterated carriage of digital signals once broadcasters cease broadcasting in analog. Nothing in this statutory mandate suggests that Congress intended the FCC to impose additional carriage requirements on cable operators concurrent with present analog must-carry requirements.

Furthermore, the legislative history demonstrates that the proposed rules exceed the Commission's authority:

Subsection (b)(4)(B) provides that, when the FCC adopts new standards for broadcast television signals, such as the authorization of broadcast HDTV, it shall conduct a proceeding to make any changes in the signal carriage requirements of cable systems

<sup>8.</sup> NPRM, ¶ 2, 13.

needed to ensure that cable systems will carry television signals complying with such modified standards in accordance with the objectives of this new section 614.9

According to Congress, the objectives of Section 614 were: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming." In the proposed digital must-carry rules, however, the Commission is not attempting to further those objectives, but rather, is attempting to create another form of federal subsidy to promote the transition to digital television and protect broadcasters from market forces in the process, an objective not within the purview of Section 614. Accordingly, the Commission must reject the proposed rules.

2. Mandatory Carriage of Analog and Digital Signals Violates the Anti-Duplication Provision of Section 614(b)(5) of the Communications Act of 1934, 47 U.S.C.A. § 534(b)(5) (1997)

The imposition of digital must-carry rules also violates the language and spirit of the anti-duplication provision of Section 614(b)(5), which provides:

Duplication not required. Notwithstanding paragraph (1), a cable operator shall not be required to carry the signal of any local commercial television station that substantially duplicates the signal of another local commercial television station

<sup>9.</sup> S. Rep. No. 102-92, p. 85 (1991) (emphasis added).

<sup>10.</sup> S. Rep. No. 102-92, p. 58 (1991); H.R. Rep. No. 102-6 28, 63 (1992); 1992 Cable Act, §§ 2(a)(8), (9), and (10).

<sup>11.</sup> Moreover, as discussed below in greater detail, the imposition of digital must-carry requirements during the transition period will not protect free over-the-air local broadcasting, will thwart the widespread dissemination of information, and will lead to economic concentration rather than competition. Because the rules proposed in the NPRM will hinder rather than support each of Congress' stated objectives, they exceed the scope of the Commission's statutory authority.

which is carried on its cable system, or to carry the signals of more than one local commercial television station affiliated with a particular broadcast network (as such term is defined by regulation).

47 U.S.C.§ 534 (b)(5). As the legislative history explains, "[t]his provision is intended to preserve the cable operator's discretion while ensuring assess [sic] by the public to <u>diverse</u> local signals."<sup>12</sup>

In order to serve the primary goal of promoting diverse programming sources, cable operators are not required to carry the signals of multiple stations affiliated with the same broadcast network. Forcing cable operators to simultaneously carry both the digital and analog signals of broadcasters is contrary to Section 614(b)(5), assuming the broadcasters broadcast substantially or partially duplicative programming on both the analog and digital channels. In addition, if the Commission imposes digital must-carry rules, there will be fewer programming voices because the carriage of the digital signals will likely cause various cable program services on channel-locked systems to be dropped, or cause new cable program services to be stymied in their launch.<sup>13</sup>

The Commission recognizes both of these problems:

To the extent that the Commission imposes a digital must-carry requirement, cable operators would be required to carry double the amount of television stations, that

<sup>12.</sup> S. Rep. No. 102-92, p. 85 (emphasis added); see also, S. Rep. No. 102-92, p. 61 ("If there are duplicate signals, the cable operator is not obligated to carry more than one signal, since carriage of duplicate signals would do little to increase the diversity of local voices."); S. Rep. No. 102-92, p. 63 ("[C]able operators do not have to carry two stations that are duplicative of one another.").

<sup>13.</sup> One of the express purposes of Section 614 was to promote "the widespread dissemination of information from **diverse sources**." Sen. Rep. 102-92, p. 58 (emphasis added). Narrowing the number of speakers certainly does nothing to promote this goal of a greater diversity of views.

# will eventually carry identical content, while having to drop various and varied cable programming services where capacity is limited. 14

This candid admission demonstrates that requiring a cable operator to carry both a broadcaster's analog signals and its duplicative digital signals is contrary to the Commission's diversity goal, in violation of the statutory language and intent. Therefore, the Commission should reject the six DTV must-carry proposals suggested in the NPRM.

#### B. Digital Must-Carry Violates the First Amendment of the Constitution

In addition to their statutory infirmities, the proposed rules are unconstitutional and must be rejected. Despite the apparent variety in the Commission's proposals, a digital must-carry scheme, no matter how structured, will impermissibly burden free speech. Only the seventh proposal, no digital must-carry, comports with the First Amendment, and gives adequate consideration to the interests of consumers and niche programmers like BET.

The digital must-carry obligations the Commission is considering will likely force cable operators to eliminate certain cable programmers, as the Commission acknowledges throughout the NPRM. Such obligations will infringe upon the First Amendment rights of cable programmers and consumers, and therefore must be rejected.

#### 1. Cable Programmers Are Entitled to First Amendment Protection

It is well established that the First Amendment rights of cable programmers are worthy of Constitutional protection.<sup>15</sup> The United States Supreme Court has recognized that "[c]able

<sup>14.</sup> NPRM, ¶39 (emphasis added).

<sup>15.</sup> Turner Broadcasting System, Inc. v. Federal Communications Commission, 512 U.S. 622, 114 S. Ct. 2445, 2456 (1994) (Turner I). More than the interests of programmers will be (continued...)

programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment."<sup>16</sup> Moreover, the Supreme Court has expressly identified BET and other programmers as parties adversely affected by must-carry rules.<sup>17</sup> The Supreme Court has further acknowledged that must-carry rules impose a burden upon this protected speech of cable programmers "by reducing the number of channels for which they can compete."<sup>18</sup> Adding digital must-carry requirements will multiply this burden by further reducing the number of available cable channels.

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<sup>15. (...</sup>continued)

harmed by the proposed rules, however: the interests of cable viewers are also at stake, and must be considered in the First Amendment calculus. "By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving information." Pacific Gas & Electric Co. v. Public Utilities Commission of California, 475 U.S. 1, 8, 106 S. Ct. 903, 907, 89 L.Ed.2d 1 (1986). "While, of course, viewers of broadcast television also have significant First Amendment interests, we doubt very much that cable subscribers 'can[] be left out of the equation' entirely." Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1454 (D.C. Cir. 1985) (citing Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1376 n. 5 (10th Cir. 1981), cert. dismissed, 456 U.S. 1001, 102 S. Ct. 2287, 73 L.Ed.2d 1296 (1982)). BET may assert not only its own free speech rights, but also those of consumers who seek access to its programs. Cf. Forty-Second Street Company v. Koch, 613 F. Supp. 1416, 1422 (S.D. N.Y. 1985) (acknowledging standing of movie theater owners and other vendors to resist restrictions by acting as advocates for third parties who seek access to their function or market, in considering equal protection argument).

<sup>16.</sup> Turner I, 114 S. Ct. at 2452; id. at 2456, citing Leathers v. Medlock, 499 U.S. 439, 444, 113 L. Ed. 2d 494, 111 S. Ct. 1438 (1991)); see also, Turner I, citing Los Angeles v. Preferred Communications, Inc., 476 U.S. 488, 494, 90 L. Ed. 2d 480, 106 S. Ct. 2034 (1986) ("Through 'original programming or by exercising editorial discretion over which stations or programs to include in its repertoire,' cable programmers and operators 'seek to communicate messages on a wide variety of topics and in a wide variety of formats."").

<sup>17.</sup> *Id.* 

<sup>18.</sup> Turner I, 114 S. Ct. at 2460. The must-carry rules impose "special burdens" upon cable programmers. Id. at 2458.

#### 2. Digital Must-Carry Rules Fail Under Intermediate Scrutiny

In order for the Commission to justify this increased burden on speech, it must demonstrate that the new must-carry rules satisfy the First Amendment. The intermediate scrutiny test, as set forth in *United States v. O'Brien*, 391 U.S. 367, 20 L. Ed. 2d. 672, 88 S. Ct. 1673 (1968) and applied in the *Turner* cases (hereinafter the "*Turner* test"), sets the proper standard by which to evaluate the proposed DTV must-carry requirements. A content-neutral regulation will be sustained if "it furthers an important or substantial governmental interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." As demonstrated below, the proposed DTV rules do not satisfy the *Turner* test.

a. The Commission Is Not Authorized To Assert An Independent
Interest to Support The Digital Must-Carry Rules And Cannot
Demonstrate That The Proposed Rules Further The Objectives of
Section 614

In order to impose constitutionally permissible must-carry rules during the transition to digital television under the *Turner* test, the Commission must first establish that an important government interest is at stake and will be advanced by such rules. In this case, the Commission cannot do so.

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<sup>19.</sup> Turner I, 114 S. Ct. at 2468; Turner Broadcasting System Inc. v. FCC, 520 U.S. 180, 137 L.Ed.2d 369, 117 S. Ct. 1174, 1186 (1997) (Turner II); NPRM ¶ 15.

<sup>20.</sup> O'Brien, 391 U.S. 367, 376-377, 88 S. Ct. 1673, 1678-1679, 20 L.Ed.2d 672 (1968). The United States Supreme Court has already determined that, at least in the analog context, the interests supporting the must-carry rules are unrelated to the suppression of free expression. Turner I, 114 S. Ct. at 2469. Therefore, BET here addresses only the first and third prong of the Turner test.

The Commission is not authorized to assert an independent interest in support of the DTV must-carry requirements it seeks to impose because changes in the signal carriage requirements, if any, must be "in accordance with the objectives of . . . section 614." Thus, by its terms, the governing statute specifically authorizes the Commission to change signal carriage requirements only in accordance with the Congressional objectives delineated in Section 614. Those objectives are revealed in the legislative history: "(1) preserving the benefits of free, over-the-air local broadcast television, (2) promoting the widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition in the market for television programming."

Stated another way, the Commission has no authority to assert objectives not contemplated by Section 614 to justify DTV must-carry rules. Therefore, in order to satisfy *Turner*, the Commission must demonstrate that one of the three interrelated objectives of Section 614 will be served. However, none of these interests are served by expanding must-carry requirements to digital television.

(1) The Interest In Preserving the Benefits of Free Over-The-Air Local Broadcast Television Is Not Implicated Here

The proposed digital must-carry rules will give broadcasters another federal subsidy without serving any legitimate interest. Congress enacted analog must-carry rules in part because it feared that cable operators could and would economically disadvantage broadcasters.<sup>23</sup> Congress believed

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<sup>21.</sup> S. Rep. No. 102-92, p. 85.

<sup>22.</sup> S. Rep. No. 102-92, p. 58 (1991); H.R. Rep. No. 102-6 28, 63 (1992); 1992 Cable Act, §§ 2(a)(8), (9), and (10).

<sup>23.</sup> Turner II, 137 L.Ed. 2d at 389. It is important to note that the goal of Congress was to (continued...)

that without mandatory carriage on cable, broadcasters would not earn enough from advertisers seeking to reach noncable subscribers to stay in business, which would disadvantage broadcasters and leave noncable subscribers without television programming.<sup>24</sup> Therefore, Congress imposed analog must-carry rules to ensure the availability of free broadcast television for those who do not subscribe to cable.

Congress' policy concerns are inapplicable in the digital environment and do not warrant additional federally mandated carriage requirements. Existing analog must-carry rules now ensure that broadcasters can reach both cable and noncable audiences. Even without mandatory cable carriage of digital signals during the transition period, broadcasters will still have continuous access to cable audiences via the analog must-carry rules. As a result, broadcasters will have the ability to receive sufficient advertising revenues to keep them economically viable, and free broadcasting will be protected.<sup>25</sup> Indeed, TvB President Ave Butensky has stated that over-the-air television has an

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<sup>23. (...</sup>continued)
preserve local broadcasting, not to maximize broadcasters' revenues to the fullest extent possible at the expense of cable programmers and operators.

<sup>24.</sup> Turner I, 114 S. Ct. at 2461, 2464; see also, S. Rep. No. 102-92, p. 60.

<sup>25.</sup> It is abundantly clear that broadcasters did not need as much "protection" from cable operators as they claimed, since 80% of broadcasters have chosen retransmission consent rather than must-carry. (NPRM ¶33). This demonstrates that broadcasting is a very popular source of programming. In fact, Congress' recognition of this fact was the impetus behind retransmission consent: "[R]eflecting the popularity and strength of some broadcasters, Congress included in the Cable Act a provision permitting broadcasters to charge cable systems for carriage of the broadcasters' signals." *Turner II*, 137 L.Ed.2d at 389. For this reason, some broadcasters believe other broadcasters are being hypocritical when they push for deregulation in most areas while seeking digital must-carry. Superior programming is "our form of must carry," CBS President-CEO Mel Karmazin said at a recent conference. *Communications Daily*, October 2, 1998, p.2.

82% audience advantage over cable networks, making over-the-air television far more attractive to advertisers.<sup>26</sup>

In addition, those television viewers without cable will continue to receive free broadcast signals. Since broadcasters will be transmitting both digital and analog signals during the transition period, a non-cable viewer will have access to free broadcasting signals in either the digital or analog mode.

Since this Congressional interest remains satisfied under the current regulatory regime, and broadcasters will continue to have access to an audience through the present must-carry rules and retransmission consent provisions, there is no justification for further favoring broadcasters by guaranteeing them an audience through additional must-carry requirements.

(2) The Proposed Rules Will Reduce The Widespread Dissemination of Information From a Multiplicity of Sources

In the *Turner* cases, the Supreme Court upheld the analog must-carry rules in part because it believed the rules promoted the widespread dissemination of information from diverse sources. Here, the proposed rules will have exactly the <u>opposite</u> effect and cannot withstand judicial scrutiny.

The Cable Television Consumer Protection and Competition Act of 1992 ("Cable Act"), which includes the analog must-carry requirements, was primarily concerned with maintaining a diversity of programming voices. The importance of diversity is explicit: "It is the policy of the Congress in this Act to (1) promote the availability to the public of a diversity of views and

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<sup>26.</sup> See TV Digest, Vol. 38, No. 37, p.3.

information through cable television and other video distribution media...." The Cable Act further states that "[t]here is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media." <sup>28</sup>

BET agrees that promoting diversity in programming sources is an important governmental interest, and believes that imposing additional must-carry requirements during the transition to digital will actually reduce diversity, a problem of which the Commission is fully aware.<sup>29</sup> Although

The Committee has consistently sought to ensure that the public will have access to many diverse and antagonistic sources of information...The Committee believes the First Amendment implies an affirmative role for the government to encourage a diversity of voices. In some instances, the First Amendment requires the government to ensure that there will be free competition of ideas and voices.

S. Rep. No. 102-92, p. 50 (emphasis added); see also S. Rep. No. 102-92, p. 51; S. Rep. No. 102-92, p. 59; FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775, 795, 98 S. Ct. 2096, 2112, 56 L.Ed.2d 697 (1978). Guaranteeing that the public has access to a diversity of voices is widely held to qualify as an important government interest "for it promotes values central to the First Amendment. Indeed, 'it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Turner I, 114 S. Ct. at 2470 (citations omitted). Promoting the widest possible dissemination of information from diverse sources is "consistent with both the [Commission's] public interest standard and the First Amendment." FCC v. WNCN Listeners Guild, 450 U.S. 582, 594, 101 S. Ct. 1266, 1274, 67 L.Ed.2d 521 (1981).

29. See NPRM ¶ 39 (acknowledging that digital must-carry rules will lead operators "to drop various and varied cable programming services."). The Commission has recognized that must-carry rules have the potential to harm diversity interests. After the Commission's must-carry rules were struck down as unconstitutional in Quincy, the Commission adopted new must-carry rules with a five-year sunset date. The Commission explained, "[W]e recognize must-carry rules are a stringent form of regulation that intrude on cable operators' free speech rights...We conclude that must carry regulations are neither desirable nor sustainable as long-term solutions to the problem of cable subscribers' access to broadcast (continued...)

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<sup>27. 47</sup> U.S.C.A. § 521 nt (b); see also id. nt. (a)(6).

<sup>28. 47</sup> U.S.C.A. § 521 nt (a)(6). The legislative history of the must-carry rules also articulates this concern:

it is not clear in which format cable operators will be required to retransmit broadcast signals, one conclusion is inescapable: if cable systems are required to carry both analog and digital signals, there will be (i) duplication of content in no small respect, and (ii) insufficient capacity on channel-locked cable systems to ensure diverse sources of programming. Inevitably, cable programmers will be eliminated from channel-locked cable systems to make room for the additional, duplicate broadcast signals, thereby reducing the number of speakers available to customers of such cable systems.<sup>30</sup>

The potential for dropping programming is far more serious in the digital environment than it was in the analog context.<sup>31</sup> Whereas ten percent or so of broadcast programming was not being carried when analog must-carry rules were imposed, here the situation is much worse because digital broadcasters are not currently being carried at all. Thus, under the proposed digital must-carry rules, one hundred percent of analog signals which are currently carried will be duplicated by the addition

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<sup>29. (...</sup>continued)
signals and, in fact, would impede our objective of maximizing program choices to viewers."
S. Rep. No. 102-92, Cable TV Consumer Act, p. 40, quoting *Memorandum Opinion and Order*, MM Docket 85-349 (May 1, 1987).

<sup>30. (</sup>NPRM ¶¶ 39, 40, 41). See also, Statement of Joseph J. Collins, Chairman and Chief Executive Officer of Time Warner Cable before the Senate Committee on Commerce, Science, and Transportation, July 8, 1998: "[O]ur systems, even those that have been substantially upgraded, remain channel locked. And they do not have the ability to add new services unless we drop some existing services."

<sup>31.</sup> Even in the analog context, the number of programming voices diminished significantly as a result of passage of the 1992 Cable Act, which codified the FCC's must-carry rules. See, e.g., Statement of Brian P. Lamb, Chairman and Chief Executive Officer of the C-SPAN Networks before the Senate Committee on Commerce, Science, and Transportation, July 8, 1998 (noting substantial loss of C-SPAN and C-SPAN2 distribution because scarce channel space was taken up by government-imposed preferences for broadcasters).

of one hundred percent of digital TV signals in each market, making the elimination of cable carriage of incumbent cable programmers such as BET a virtual certainty.

Undoubtedly, the economics of running a cable system will compel cable operators to first drop programs with targeted audiences, such as women or minorities, to accommodate the new DTV channels that must be carried. With the demise of such programming, viewers will suffer an ever-narrowing range of sources of programming, and the diverse voices that are now heard on cable television will be silenced.<sup>32</sup> To make matters worse, such rules will require cable systems to retransmit redundant material that the vast majority of people, who do not own digital receiver television sets, will not be able to view -- leaving them with blank channels instead of programs they currently enjoy.

The loss of diverse voices such as BET's is important to all members of society, not just to BET's target audiences. The Commission has recognized that stations and programming targeted to minority needs "serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the

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<sup>32.</sup> Joseph Collins of Time Warner Cable has explained why programming loss is inevitable if DTV must-carry rules are imposed. He uses the Northern Manhattan portion of Time Warner's New York City systems, which is fully channel-locked, to illustrate the problem. That portion of the system offers 31 channels in the basic tier, fourteen of which are must-carry analog broadcast signals and nine of which are public, educational, and governmental or leased access channels. This leaves only eight "optional" services that "almost certainly would have to be dropped if the system is required to double the number of channels carrying broadcast services in order to comply with a digital broadcast must-carry requirement." See Statement of Joseph J. Collins, Chairman and Chief Executive Officer of Time Warner Cable before the Senate Committee on Commerce, Science, and Transportation, July 8, 1998.

nation...."<sup>33</sup> All Americans will suffer as voices that "enrich[] and educate[] the non-minority audience" disappear from cable programming.<sup>34</sup>

This threat to diversity will come as no surprise to the Commission. To its credit, the Commission's concern with cable system capacity problems and the concomitant threat to programming diversity is evident throughout the NPRM.<sup>35</sup> Several of the proposed must-carry options, including the Phase-In Proposal and the System Upgrade Proposal, are premised on the understanding that channel capacity is insufficient to handle the obligations of mandatory digital carriage.<sup>36</sup> In its discussion of the Immediate Carriage option, the Commission expressly inquires whether such a proposal will adversely affect program diversity.<sup>37</sup> As noted above, the answer is a

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<sup>33.</sup> Waters Broadcasting Corp., 91 FCC2d 1260, 1265, 55 RR2d 773 (1982) (discussing benefits of minority-owned and controlled radio station to the general public in considering mutually exclusive applications for a new radio station in Michigan).

<sup>34.</sup> Waters, 91 FCC2d at 1279 (Separate Statement of Commissioner Fogarty).

<sup>35.</sup> In assessing the diversity impact in this docket, the Commission should also examine the nature and effect of consolidated ownership among certain broadcast and cable program networks. Numerous broadcasters and broadcast networks now own cable networks. Many of these broadcast/cable operations did not exist prior to passage of the Cable Act, but instead have evolved since 1992. The Commission should take notice of those cable networks that are affiliated with broadcast networks and do not file in this proceeding, for it is no secret that the broadcast entities that own those cable networks view the cable networks as significant additional outlets for their views. Michael Eisner, Chairman of ABC-owned Disney, underscored the growing significance of cable networks to broadcasters when, asked about ESPN and other ABC cable properties, he stated on the *Charlie Rose Show* that "there's great growth in those [cable] assets because ABC eventually will have to change its relationship with its affiliates...." "Eisner Questions Need for TV Affiliates in Digital World," *Communications Daily*, October 5, 1998, p.1. Thus, the silence of affiliated cable networks in this proceeding will be particularly instructive.

<sup>36.</sup> NPRM, ¶¶ 44-46.

<sup>37.</sup> NPRM, ¶ 41.